

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**V.**

**CLINTON BROOKS,**

**Defendant.**

**CASE NO. 8:05CR116**

# MEMORANDUM AND ORDER

This matter is before the court on the Defendant's application for leave to proceed in forma pauperis ("IFP") on appeal (Filing No. 209). The Defendant appeals from the memorandum and order (Filing No. 205) denying his motion for appointment of counsel in this action brought pursuant to 28 U.S.C. § 2255.

This Court must certify pursuant to 28 U.S.C. § 1915(a)(3) and Federal Rule of Appellate Procedure 24(a) whether an appeal by a party wishing to proceed IFP on appeal is taken in “good faith.” *Henderson v. Norris*, 129 F.3d 481, 485 (8<sup>th</sup> Cir. 1997). If the Court concludes that such an appeal is not taken in good faith, the reasons for the denial must be stated in writing pursuant to Federal Rule of Appellate Procedure 24(a). *Id.* The good faith standard is an objective one and is not met if the issue presented is frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

Here, the Defendant's appeal is frivolous. The Court's order denying the appointment of counsel was without prejudice. The order clearly stated that new counsel would not be appointed "at this time." (Filing No. 205.) At this stage in the postconviction proceedings the Court is not required to appoint counsel. However, if an evidentiary

hearing is necessary, counsel will be appointed.<sup>1</sup> R. Governing § 2255 Proc. For the U.S. District Courts 8(b). An appeal of the order denying counsel at this time would be premature. Therefore, the Defendant's motion to proceed IFP on appeal is denied.

The Clerk of the Court will be directed to serve notice of this decision on the parties and the Eighth Circuit Court of Appeals pursuant to Federal Rule of Appellate Procedure 24(a)(4) and to process the appeal. If the Defendant desires, he may file a motion to proceed IFP on appeal with the Eighth Circuit Court of Appeals following the directions set out in Federal Rule of Appellate Procedure 24(a)(5). However, the Court advises the Defendant that, even if IFP status were granted, he would have to pay the \$455 appellate filing fee in installments. 28 U.S.C. § 1915(b).

THEREFORE, IT IS ORDERED:

1. The Defendant's motion to proceed in forma pauperis on appeal (Filing No. 209) is denied;
2. The Clerk shall mail copies of this memorandum and order to the parties and the Eighth Circuit Court of Appeals as required by Federal Rule of Appellate Procedure 24(a)(4); and
3. The clerk shall process the appeal to the Eighth Circuit;

DATED this 24<sup>th</sup> day of October, 2006.

BY THE COURT:

s/Laurie Smith Camp  
United States District Judge

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<sup>1</sup>The Court notes that the appointment of counsel (Filing No. 221) was for the purpose of Mr. Brooks's testimony at the trial of his codefendant, M,A, Yah.